

in *Smith*, and we believe totally out of sync with the philosophy of this committee and Congress as a whole, which was endorsed by passing the Religious Freedom Restoration Act.

We bring to this committee's attention four brief specific problems of Judge Breyer's opinion in *New Life*. First, he endorses the notion that private schools can be regulated by subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local school officials. Many school districts in Massachusetts have adopted written policies which specify objective criteria which they will evaluate for an approval. But some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private school and make a wholly discretionary decision.

The Federal district court in this case held that the system of subjective discretion violated the free exercise and establishment clause rights of this private religious school. A system of unwritten, subjective, prior restraints I believe is simply unacceptable to a nation with a historical commitment to the freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The school had offered to voluntarily submit to achievement tests, and Breyer rejected this offer as untrustworthy.

I see that my time is up. The written testimony has been submitted and I ask you to read it. But if I could just summarize in this way:

Judge Breyer's views are in lock-step opinion and sympathy with the majority opinion in *Smith*. He gives very low opinion and value to the free exercise of religion. Although he claims to be enforcing the compelling State interest test, if you read his opinion closely, he really says all the State has to do is enact reasonable laws. Mere reasonableness is not enough to override the free exercise of religion. There must be a compelling governmental interest for the particular regulation at stake, and that particular regulation cannot have any less restrictive alternatives.

Judge Breyer substituted his own judgment for the judgment of that religious school as to what was acceptable to their religions views and what would burden their religion. And the substitution of a judge for his determination of someone else's religion is such a departure from an appropriate judicial methodology of evaluating religious freedom, we view it very dangerous. He gratuitously said that home schooling can be constitutionally banned entirely by a State. We think that was not a necessary decision and very dangerous to have someone on the Supreme Court who thinks that that form of education can be constitutionally banned outright.

[The prepared statement and a letter of Mr. Farris follow:]

PREPARED STATEMENT OF MICHAEL P. FARRIS

Mr. Chairman and members of the Judiciary Committee:

My name is Michael Farris. I am the president of the Home School Legal Defense Association (HSLDA) and our affiliated group, the National Center for Home Education. HSLDA has over 40,000 member families. We have members in all fifty states and every U.S. territory.

Through the National Center for Home Education we network with approximately 150 state and regional organizations, which in turn network with three to four thousand local home school support groups.

There are approximately 400,000 families home schooling approximately 1 million children in this country.

By way of personal background, I am a constitutional lawyer with an emphasis in free exercise litigation. I last testified before this Committee as the co-chairman of the drafting committee for the coalition supporting the Religious Freedom Restoration Act.

Home School Legal Defense Association opposes the nomination of Stephen Breyer to the Supreme Court of the United States because his views on the subject of the free exercise of religion—especially within the context of education—are so far beyond the pale of acceptability that his presence on the Supreme Court would represent a clear and present danger to our freedoms.

We base our assessment of Judge Breyer on his exhaustive, articulate, and, in our view, dangerous opinion in *New Life Baptist Academy v. East Longmeadow School District*, 885 F.2d 940 (1st Cir. 1989).

On behalf of the private school, I wrote an *amicus* brief which was submitted to Judge Breyer and his fellow panel members in that case. After Judge Breyer reversed an excellent opinion by the federal district court, the private school was unable to afford to have private counsel petition the Supreme Court for a Writ of Certiorari. Our organization undertook their case at that point, and I became lead counsel and personally wrote the *cert* petition to the Supreme Court.

The Supreme Court denied the petition during the same period of time it was deciding the discredited opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). This Commission helped effectively overturn *Smith* by the passage of the Religious Freedom Restoration Act. We believe and are greatly concerned that Judge Breyer's legal philosophy is in full accord with the majority opinion in *Smith* and totally out of sync with the philosophy this Committee and Congress as a whole endorsed by passing the Religious Freedom Restoration Act.

We bring to this Committee's attention four specific problems with Judge Breyer's opinion in *New Life*:

First, Judge Breyer endorses the notion that private schools can be regulated by the subjective, unwritten, discretionary opinions of public school officials.

Under Massachusetts law, private schools, including home schools, must be "approved" by local public school officials. Many school districts have adopted written policies which specify objective criteria by which they will evaluate a request for approval. Some districts, like the one involved in this case, merely say they want to review the curriculum, teacher qualifications, lessons, and enter the private (often religious) schools to make a wholly discretionary decision.

The federal district court held that this system of subjective discretion violated the free exercise rights of this private religious school. A system of unwritten, subjective, prior restraints is simply unacceptable to a nation with an historical commitment to freedom of conscience and expression.

Judge Breyer rejected the private school's offer of an objective means of analysis. The private school officials voluntarily offered to submit achievement test results to the public officials. Breyer viewed this offer as untrustworthy. He found it to insufficiently regulate the conduct of those who ran the school.

We have a hard time understanding why people can be trusted to choose their leaders by voting for school board members and United States Senators, yet are deemed unfit and untrustworthy to make unregulated choices regarding the education of their own children. Breyer's mistrust of parents and church officials while endorsing the use of government power over their First Amendment choices is an anathema to those who believe in the competence of Americans and those who love freedom.

It is impossible to reconcile Judge Breyer's distrust of the parents and church leaders in *New Life* and the following strong endorsement of the rights of parents by former Chief Justice Burger written in a majority opinion for the Court:

"That some parents may at times be acting against the interests of their children" * * * creates a basis for caution, but it is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest * * * The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition."

Parham v. J.R., 442 U.S. 584, 602-603 (1979).

Moreover, Judge Breyer views regarding the right of government officials to rule by their "mere discretion" directly violate longstanding precedents of the United

States Supreme Court. In *Hague v. CIO*, 307 U.S. 496 (1939), the Supreme Court ruled that it is unconstitutional to subject the exercise of a First Amendment freedom to the discretionary opinions of government officials. Judge Breyer's views represent a slap in the face to this line of Supreme Court precedent. Judge Breyer embraces government power too readily and spurns legitimate, longstanding protections of constitutional freedoms too easily.

Second, Judge Breyer's *New Life* opinion cites with approval three decisions which he says, "uphold [an] effective total ban on home schooling." Consider an analogy from *Employment Division v. Smith*. Justice Scalia's opinion in *Smith* was subjected to much criticism because it cited with approval *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). *Gobitis*, of course, is the case where the Supreme Court said it was constitutional to expel Jehovah's Witnesses from the public schools for refusing to salute the flag. By citing *Gobitis*, Justice Scalia clearly indicated that his willingness to restrict religious freedom carried a long way indeed.

Judge Breyer's citation of these anti-home school cases raises a similar concern. We believe his opinion clearly indicates he would vote to uphold a state law which bans home education. Four hundred thousand families in this country deserve a better choice for the Supreme Court. It is simply unacceptable to American home schoolers to have a person on the Court of last resort for their freedoms who believes they have no constitutionally protected right to educate their children.

Judge Breyer is no moderate; but possesses the most extreme views concerning the rights of those who lovingly teach their children at home.

Third, Judge Breyer believes that *Wisconsin v. Yoder*, 406 U.S. 205 (1972), does not state a general principle of parental religious liberty. His *New Life* opinion clearly indicates that he sides with the school of thought that *Yoder* grants religious freedom only to Amish parents. This view raises two concerns.

The lesser concern is this: Should someone be elevated to the Supreme Court who so clearly misunderstands the very nature of a Supreme Court decision? The Supreme Court simply does not hear cases which do not involve general principles of law. If the *Yoder* decision was to be limited to its facts, it would have never been accepted for review by the high Court.

The greater concern arises from Breyer's aberrant views on religious freedom. Either religious freedom is protected for every faith in America or it is protected for none. The reason the Religious Freedom Restoration Act passed was that virtually every faith group endorsed it as stating a broad principle that every group is entitled to religious freedom in America.

We believe that a person is disqualified to serve on the Supreme Court if he has ever endorsed the notion that a particular constitutional protection applies to one faith group, but not to others. Breyer refused to apply *Yoder* to a Baptist church in Massachusetts. We believe that the Supreme Court should be reserved for those who believe that all parents of all faiths have the rights enunciated in *Yoder*.

Fourth, Judge Breyer endorses the duplicitous notion religious school offer "religious education" when one is talking about government funding, but, when the issue is government regulation, he then believes these same schools offer "secular education." We believe that schools which are too religious to receive direct funding under the Establishment Clause are too religious to be regulated by the government under the Free Exercise Clause. The Constitution should not be interpreted as a judicial Catch-22.

While these are our specific concerns relating to religious freedom and private education, we believe there are broader concerns which should trouble all Americans.

Judge Breyer has endorsed the idea that one fundamental freedom can be subjected to a prior restraint-styled approval process which depends solely on the discretion of local government officials. If the free exercise of religion can be subjected to such a system of discretionary prior restraints, there is no reason to believe that freedom of speech, freedom of press, and freedom of assembly would fare any better. Either Judge Breyer has a narrow view of all First Amendment freedoms or he has a special antipathy for religious freedom. Neither alternative is acceptable for a member of the United States Supreme Court.

This Committee was very recently involved in helping to reinstitute a broad basis of religious freedom for all Americans of all faiths. The Supreme Court's decision in *Smith* represented a dramatic departure from established precedent and, more importantly, from our longstanding national commitment to religious liberty. No scholar could read Judge Breyer's opinion in *New Life* and have any doubt that he would have been part of the majority in the *Smith* case.

This Committee is on record endorsing a broad view of religious freedom by its passage of the Religious Freedom Restoration Act. It would be totally inconsistent to turn immediately around and place a nominee on the same Court who personifies

the philosophy of big government and little freedom that this Committee has just rejected.

We need Justices who trust Americans much and government little. We need Justices who readily embrace freedom and rarely embrace government power. Judge Breyer embraces government power too readily and freedom—especially religious freedom—far too rarely.

HOME SCHOOL LEGAL DEFENSE ASSOCIATION,
Paeonian Springs, VA, July 22, 1994.

Hon. JOSEPH BIDEN,
221 S.R.O.B., Washington, DC.

DEAR SENATOR BIDEN: Thank you for the opportunity to provide you with more information regarding my concerns about Judge Breyer. You will recall that I questioned Judge Breyer's failure to follow the fact stipulation approved by the lower court that all the instruction in this school was religious in nature. All subjects are taught from a Christian perspective.

You asked me for more information on how math and other subjects can be taught from a religious perspective and for information on the history of constitutional litigation relative to textbooks. I am happy to supply you with the additional information you requested.

1. Federal cases repeatedly state that academic textbooks can be too religious for Establishment Clause purposes.

The Establishment Clause has consistently been interpreted to prohibit the use of tax money for textbooks or instruction in religious schools, even where the texts or instruction were in secular subjects like math. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayers had standing to sue to stop the teaching of reading and arithmetic in religious schools); *Rhode Island Fed. of Teachers v. Norberg*, 479 F.Supp. 1364 (R.I. 1979) (tax deductions for secular textbooks by parochial school families violates the Establishment Clause because the government would have to inspect the books to eliminate those with religious content and supervise the schools to make sure that the books were not used in the course of religious instruction), *Public Funds for Public Schools v. Marburger*, 358 F.Supp. 29 (N.J. 1973) (reimbursing parents for cost of "secular, nonideological textbooks" violates the Establishment Clause because the government would have to inspect the books to verify that there was no religious content and monitor instruction to ensure that they were not used for religious purposes).

2. Christian teaching of secular subjects (including math) can be quite religious.

Consider this Christian Teacher's Manual:

"The Christian approach to teaching arithmetic begins with knowing and teaching the students that the universe has structure and order because it was created by a rational, orderly God. In arithmetic the students study one aspect of the order of the real world and indirectly begin to know more about the God Who has given them the world they live in. In the arithmetic processes the students are not creating truth but learning truth; they are, in a sense, thinking God's thoughts after Him. The students will find exactness, preciseness, and completeness in the subject matter of mathematics, just as would be expected in God's world."

A Beka Mathematics 5 Teacher's Guide, Introduction [attached as Appendix A]. Or consider this, from the Spring, 1968 issue of the *The Christian Teacher*:

"A Christian school that is content only with the teaching of manipulatory skills of arithmetic, algebra, and geometry blinds the student's perception to all but a fraction of the glory of God reflected in the unique mirror of mathematics."

Even the methods of teaching reflect a distinctively Christian emphasis, as shown in this Teacher's Guide:

"We are unabashed advocates of traditional arithmetic, partly because the students learn something that can be built upon, but also because it accords with our Christian viewpoints on education. Only from a Christian perspective can the basic rationale, the intrinsic reasonableness of traditional elementary arithmetic be seen and appreciated. Traditional arithmetic will not succeed unless it is taught with the conviction that something more than arbitrary processes derived from arbitrary principles is at issue. The elementary student does not need to "understand" $2+2=4$ in order to learn it and use it; he will learn the abstract principles later. But the elementary student does need to see his multiplication tables as part of the truth and order that God has built into reality. From the Christian perspective, $2+2=4$ takes on cosmic significance, as does every fact of mathematics, however particular! Traditional elementary arithmetic is Christian elementary arithmetic."

A Beka Mathematics 5 Teacher's Guide, Introduction, *supra*.